IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 15TH NOVEMBER 2007 / 24TH KARTHIKA 1929

SA.No. 330 of 1994(E)

AS.46/1990 OF DISTRICT COURT, PATHANAMTHITTA
OS.3/1985 OF MUNSIFF'S COURT, PATHANAMTHITTA
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APPELLANT/APPELLANTS/PLAINTIFFS
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1. **MATHAI MICHAEL, VALIYAKALAYIL KODIYATHU HOUSE, VETTIPURAM MURI, PATHANAMTHITTA VILLAGE.**

2. **MICHAEL RACHEL OF -DO-**

BY ADV. SRI.P.G.PARAMESWARA PANICKER (SR.)
SRI.P.GOPAL

RESPONDENT/RESPONDENT/DEFENDENT

PATHANAMTHITA MUNICIPALITY,
REP. BY THE MUNICIPAL COMMISSIONER,
PATHANAMTHITA.

BY ADV. SRI.A.N.RAJAN BABU

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 15/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 330 OF 1994

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Dated this the 15th day of November, 2007

JUDGMENT

Plaintiffs in O.S.3/1985 on the file of Munsiff Court, Pathanamthitta are the appellants. Defendant Municipality is the respondent. Appellants instituted the suit seeking a decree for declaration of title to the plaint schedule properties and for fixing boundary and for recovery of possession of the property and for permanent prohibitory injunction. Plaint schedule properties are described as six cents in R.S.No.203/2 having length of 90 meters and width of 2.70 metres and about 34 cents in R.S.A. No.203/7 having a length of 53.9 meters and width of 3.7 meters. Appellants claimed title to item No.1 of plaint schedule property under Ext.A1 and title to item No.2 of plaint schedule properties under Ext.A2 respectively. The title of appellants to the properties covered under Ext.A1 and A2 was not

disputed. When first plaintiff is employed in Baharin, his nephew had filed O.S.201/1976 in respect of the plaint schedule properties against Kesavan and five others seeking a decree for permanent prohibitory injunction. Subsequently appellants were got themselves impleaded as additional plaintiffs 2 and 3. In that suit appellants sought a decree for injunction restraining defendants therein from trespassing into the plaint schedule properties contending that they have no right of way through the plaint schedule properties. Defendants in that suit contended that there is a way passing through the plaint schedule properties which reaches eastern Mundukottackal public road and that way has been in existence for the last more than two hundred years and defendants and persons of the locality were using that way as of right and they have an easement right of way to that way. Rejecting the case of the defendants and accepting the case of appellants, under Ext.A3 judgment dated 31.3.1977,

a decree for permanent prohibitory injunction was granted in favour of appellants restraining defendants therein from trespassing into the plaint schedule property or making use of plaint schedule property as a way. That decree has become final. Subsequent to the decree alleging that defendants in violation of the decree committed trespass by removing the pillars and fencing, E.P.114/1982 was filed for prosecuting the judgment debtors therein. In that execution petition, judgment debtors got summoned records from the Municipality to prove that a road was formed through the plaint schedule properties by the Municipality. Under Ext.B3 order, E.P was dismissed holding that judgment debtors did not violate the decree and the alleged removal of the fence and the pillars was before the date of the decree. It was thereafter appellants instituted O.S.3/1985 contending that respondent Municipality trespassed into the plaint schedule property and formed a new road, without the consent or permission of appellants and annexed

plaint schedule properties as part of that road. Claiming that appellants have title to that property, recovery of possession of plaint schedule properties were sought. Contending that Municipality unauthorisedly constructed a retaining wall to the newly formed road, a decree for removal of the retention wall was also sought. Appellants also sought fixation of the boundary of item No.1 and 2 of plaint schedule properties. In addition they sought a permanent prohibitory injunction restraining widening of the existing way. Respondent resisted suit contending that the suit is not maintainable as it was not instituted as provided under sub section (3) of Section 392 of Kerala Municipalities Act. It was also contended that appellants are in possession and enjoyment of the property excluding the area covered by the two roads Chittakkattupadi-Poovanpara road and Mundukottackal-Mylapra road. Chittakkattupadi-Poovanpara road lies on the northern side of item No.2 of plaint schedule property and on the

southern side of item No.1 of plaint schedule property and Mundukottackal-Mylapra road lies on the eastern side of item No.1 and 2 of plaint schedule properties. It was contended that execution petition was dismissed on merits after recording evidence finding that allegations of appellants are false. According to respondent, the road which appellants claimed to be a pathway is known as Chittakkattupadi-Poovanpara road and it is the subject matter of the suit and it was in existence long before and it vested in the erstwhile Pathanamthitta Panchayat and after the formation of Pathanamthitta Municipality the said road vested in the Municipality as a successor in interest." It is further contended that appellants are not entitled to the decree sought for. It was also contended that there was no practice of obtaining surrender deeds from the land owners for the surrender of lands for road formation in the Panchayat or Municipality, who had no objection for surrender and Municipality did not trespass

into the plaint schedule properties and the retaining wall was constructed on 3.10.1980. It is therefore contended that as the suit was not filed within six months from that date, suit is not barred.

2. Learned Munsiff on the evidence of Pws. 1 to 5, Dws.1 to 4, Exts.A1 to A12, B1 to B11 and C1 to C4 dismissed the suit holding that appellants did not establish their title. It was also found that act of dispossession was on 3.10.1980 and the suit was filed only on 1.1.1985 and so it is barred. Plaintiffs challenged the decree and judgment before District Court, Pathanamthitta in A.S.46/1990. Learned District Judge on reappreciation of evidence found that the report and plan submitted by the Commissioner establish that appellants have title to the plaint schedule properties and I Q J portion in R.S.No.203/2 and plot M L R S portion in R.S.No.203/7 which now form part of the road are portions of the property covered under Exts.A1 and A2 and therefore

appellants have title to the properties. Learned District Judge also found that Ext.A4 shows that as per mass petition filed by the people of the locality Municipal authorities visited the site and road was included in the road register after mass petition and therefore case of the Municipality that road was in existence for a very long time used by the public cannot be accepted. But relying on Ext.B9 File, it was found that new road was constructed and respondent obtained possession of the properties atleast from 3.10.1980 and under Kerala Municipalities Act the road vests with Municipality. Learned District Judge also found that as provided under sub section (3) of Section 392 of Kerala Municipalities Act suit should have been filed within six months from the date on which cause of action arose and as suit was not filed within six months from 3.10.1980, appellants are not entitled to the decree for recovery of possession or fixation of boundary. But it was found that respondent is not entitled to further

widen the road. Hence the appeal was allowed in part and a decree restraining respondent from widening the existing pathway was granted. It is challenged in the appeal.

3. The appeal was admitted formulating the following substantial questions of law.

> 1. Is the finding of courts below that suit for declaration of title to immovable property and for recovery of possession of the same from the defendant Municipality on the allegation of trespass by defendant is barred by limitation, since it was not instituted within a period of six months as provided under section 392 (3) of Kerala Municipalities Act,

contrary to law?

2. Is not Article 65 of the Limitation Act, 1963, the proper Article applicable to the suit.

3. Is the finding that the suit property vested in the defendant contrary to law.

4. Learned counsel appearing for appellants and respondent were heard.

5. Learned counsel appearing for appellants argued that Ext.A3 judgment establish that appellants had successfully contended even in 1966 that there is no way in existence through the plaint schedule properties and the defendants therein contended that there existed a way for the last more than 100 years and on the evidence it was found that no such way existed and defendants therein are not entitled to trespass into the plaint schedule property. It was argued that

subsequent to the decree the defendants caught-hold of the Municipality and formed a road and encroaching upon portions of item Nos.1 and 2 of plaint schedule properties and respondent has no case that they have acquired any portion of the plaint schedule property for formation of the road or that appellants surrendered any portion of the properties, for formation of the road and when under Exts.A1 and A2 appellants have title to the plaint schedule property unless the title is barred by adverse possession or is lost by acquisition or surrender, appellants are entitled to the decree sought for. It was argued that Section 392(1) of the Actwould apply only in a suit against the Municipality or its Officers in respect of any act done or purporting to have been done in pursuance of the Kerala Municipalities Act or any Rule or Regulation or bye-law made thereunder and so long as respondent has no case that a road was formed through the plaint schedule properties in accordance with the Municipalities Act or the Rules

suit is not barred under section 392(3) and as the suit is for recovery of possession on the strength of title only Article 65 of Limitation Act 1963 would apply and courts below committed an error in holding that suit is barred. It was also argued that respondent has no case that Municipality formed a road after appellants surrendered the plaint schedule properties and as they have no case that there was an acquisition, case of the appellants that the road was formed after trespass should have been accepted and appellants should have been granted a decree as sought for. Learned counsel appearing for the respondent argued that a way was in existence for last several years which was being used by the general public of the locality and the public after surrender from the respective owners widened the way into a road and Municipality has already constructed a retaining wall and maintained the road, as the road vested in the Municipality and therefore appellants are not entitled to the decree sought for. It was also

argued that Ext.B8 measurement book would only show that Municipality had constructed the retaining wall and much reliance cannot be placed on the caption of the work in Ext.B9 File and Ext.B7 shows that Chittakkattupadi-Poovanpara road is shown as one of the roads vested in the Municipality and therefore appellants are not entitled to the decree sought for. It was also argued that even according to appellants, plaint schedule properties were converted into a road on 3.10.1980 and as provided under sub section (3) of Section 392, a suit should have been filed within six months from the date of cause of action and as suit was not filed within six months from 3.10.1980 and instead was filed only in 1985 the relief was rightly disallowed by the courts below and the appeal is only to be dismissed.

6. The title of appellants to item No.1 and 2 of plaint schedule properties under Ext.A1 and A2 are not disputed. The Commissioner has identified the properties and prepared Ext.C2 plan. As per

Ext.C2 plan, item No.1 and 2 of the plaint schedule properties are portions of the properties belonging to appellants under Exts.A1 and A2 and therefore appellants have title to the properties. Respondent is not disputing the title as such, but only contention that a way was in existence earlier which was being used by the general public and subsequently there was a surrender of the portions of the property through which the way was passing and the public formed a road along that way and later they requested the Municipality to maintain the road and the road was thus maintained by the Municipality and appellants have no title to the portion of the properties converted into a road. Even respondent has no case that there was any acquisition of any portion of the properties covered under Exts.A1 and A2 for forming a road. Mundukottackal-Mylapra road admittedly lies to the east of plaint schedule properties. Appellants were originally residing in the building in survey No.203/2 and later shifted their residence to the

house in survey No.203/7. The public road runs through the east of that property. Learned counsel appearing for respondent pointed out that evidence of PW5 shows that a way was in existence from the eastern public road upto the residential house of the plaintiffs in survey No.203/2 earlier and it is that pathway which was subsequently widened by the public and the said road now vests with the Municipality. Ext.B9 is the File which was originally got summoned in the E.P filed against defendants in O.S.201/1976 for violation of the decree of Ext.A3 judgment. Ext.B9 shows that a mass petition dated nil was received by the Municipality on 16.4.1980 and it was referred to the Municipal Engineer. It is pursuant to the said mass petition, tender was invited for formation of Chittakkattupadi-Poovanpara road. The last date of tender was 24.5.1980. The agreement available in Ext.B9 file shows that the agreement was executed on 3.10.1980 and work has to be completed on 2.11.1980. The work entrusted thereunder reads:-

"The work of forming Chittakkattupadi-Poovan para road ."

The file also contains request from the contractor to extent the period upto 2.11.1980. As rightly pointed out by learned counsel appearing for appellants, it is absolutely clear from Ext.B9 file and the evidence of DW1 the Municipal Engineer who was the Engineer during the relevant period, that the road was in fact formed only in 1980 and it was not existing earlier. Though reliance was placed on Ext.B7 register it is seen from Ext.B7 that in page 45 there is an entry as item No.98 which reads:-

"Chittakkattupadi-Poovanpara road."

In the column whether opened by Panchayat/constructed under Sramadan/L.D. it is recorded as follows:-

"Main road Branch road- newly formed by the local people by sramadan."

This entry does not show when it was recorded. But the signatures seen in that page is dated 19.3.1983. A perusal of Ext.B7 register would establish that the entry regarding the road was made only after all the other entries upto page 96 were entered and except the said entry all the entries are written in a different ink. Therefore there is force in the argument of the learned counsel appearing for appellants that the said entry in Ext.B7 was subsequently made when the execution petition against the judgment debtors in O.S.201/1976 was pending. The evidence clearly establish that no road was in existence earlier through the plaint schedule properties. Eventhough respondent Municipality is not a party to O.S.201/1976, it is clear from Ext.A3 judgment that the very contention of the defendants in that suit was that a pathway is existing running through the plaint schedule properties and the defendants and other people of the locality have a right of way through the plaint schedule properties, which was

negatived under Ext.A3. Therefore Ext.A3 atleast etablish that there was an assertion on the part of appellants that no pathway exists through the plaint schedule properties and the case of defendants in the suit about existence of the pathway was repelled by the court under Ext.A3 judgment and it has become final. Therefore it is clear that in 1976 when the suit was filed, there was no road through the plaint schedule properties. Therefore during the pendency of the suit or after Ext.A3 judgment, it cannot be believed that appellants surrendered any portion of his properties for the formation of the road as claimed by respondent so as to enable the general public to construct a road and thereafter handedover the road to the Municipality. If in fact a road was constructed as claimed, then Ext.B9 file would not have shown that the work entrusted was for "formation of the road". Therefore on the evidence, it can only be found that no road was existing through the plaint schedule properties

and plaint schedule properties were converted into a road by respondent, by trespassing into the plaint schedule properties. It is more so when there is no case of acquisition and there is no evidence to establish any surrender. If that be the case, it can only be found that appellants have title to the plaint schedule properties.

7. Then the question is whether the appellants are entitled to a decree for recovery possession on the strength of their title. When appellants have title to the properties unless that title is barred either by adverse possession and limitation or was lost by either acquisition or surrender, appellants are entitled to a decree for recovery of possession. There is no plea of adverse possession. There is no case of any acquisition. Though case of surrender to the public was pleaded, no evidence was adduced. When Ext.A3 judgment was obtained by the appellants, there is no chance for an oral surrender as claimed by the respondent.

8.When a suit is filed for recovery of

possession on the strength of title, appellants need not establish their possession within a period of twelve years. Instead burden is on respondent to establish that title wass lost by their adverse possession. In the absence of plea of adverse possession, appellants are entitled to a decree for recovery of possession.

9. Learned District Judge dismissed the prayer on the ground that plaint schedule property was formed into a road which vests with the Municipality and the suit is not filed within six months from the date on which cause of action has arisen. The finding was that the road was formed in 1980 and as provided under sub section (3) of Section 392 suit should have been filed within six months from that date and as suit was filed only in 1985 it is barred.

10. Section 392 of the Municipalities Act reads:-

> 392. Institution of suits against municipal

authorities, officers and servants:- (1) No suit shall be instituted against the municipal council or against any municipal authority or against any municipal officer or other municipal employee or against any person acting under the order of direction of any municipal authority or any municipal officer or other municipal employee, in respect of any act done or purporting to have been done, in pursuance of this Act or any rule, regulation or bye-law made thereunder, until the expiration of two months after notice in writing has been left at the

municipal office and, in the case of such officer, employee or person, unless notice in writing has also been delivered to him or left at his office or place of residence, and unless such notice states explicitly the cause of action, the nature of the relief sought,the amount of compensation claimed, and the name and place of residence of the intending plaintiff, and unless the plaint contains a statement that such notice has been so left or delivered.

(2) Nothing in sub section(1) shall be deemed to apply to a suit in which the only

relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the institution of the suit.

(3) Every such suit shall be commenced within six months after the date on which the cause of action arose or in cases of continuing injury or damage during such continuance or within six months after the ceasing thereof.

(4) If any person to whom any notice is given under sub section (1) tenders amend to the plaintiff before the suit is instituted, and if the

plaintiff does not recover in any such action more than the amount so tendered he shall not recover any costs incurred after such tender by the person to whom such notice has been given and the defendant shall be entitled to costs as from the date of tender.

(5) Where the defendant in any such suit is the chairman, the Commissioner, a municipal officer or servant, payment of the sum, or any part of any sum, payable by him in, or in consequence of, the suit, whether in respect of costs, charges, expenses, compensation for damages or

otherwise, may be made with
the sanction of the council,
from the municipal fund."

The suit contemplated under sub section (1) of Section 392 is a suit in respect of any act done or purporting to have been done in pursuance of the Municipalities Act or any rule, regulation or bye-law made thereunder against the Municipality or Municipal authority or any Municipal Officer or Municipal employee or any person acting under the order or direction of Municipal authority. Respondent has no case that plaint schedule property was converted as a road either as provided under the Municipalities Act or under any law, rule or regulation or bye-law made thereunder. Therefore it cannot be said that a suit for recovery of possession on the strength of title is not maintainable against the Municipality, if not filed within six months from the date on which plaint schedule property was reduced into the unlawful possession by the

Municipality. The period of limitation of a suit for recovery of possession is governed as provided under Article 64 or 65 of Limitation Act,1963. When suit is for recovery of possession on the strength of title, only Article 65 applies and suit has to be filed within twelve years from the date on which the property was reduced into unlawful possession of the respondent. Therefore the finding of the first appellate court that claim for recovery of possession is barred under section 392(3) of Kerala Municipalities Act is not sustainable.

11. As appellants have title to the plaint schedule properties and that title was not been lost by adverse possession and the property was not acquired by the Municipality and was also not surrendered by the appellants and it was formed into a road without the permission or consent of the appellants, they are entitled to a decree for recovery of possession.

The appeal is therefore allowed. The decree

granted by the first appellate court is modified as follows:- It is declared that appellants have title to the plaint schedule properties, which are marked plot E F G H J and A B C D in Ext.C2 plan. Appellants are entitled to recover possession of the same on the strength of their title. Respondent is directed to remove the retention wall constructed and to surrender possession of plaint schedule properties within three months from today failing which appellants are entitled to take delivery of the property and remove the retention wall. Appellants are also entitled to get cost of the suit.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006